Filed 4/14/03 P. v. Chambers CA2/6

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

KEITH ARTHUR CHAMBERS,

Defendant and Appellant.

2d Crim. No. B158426
(Super. Ct. No. 2001030696)
(Ventura County)

Keith Arthur Chambers appeals his conviction of petty theft with a prior. (Pen. Code, § 666.)[1] The trial court sentenced him to the middle term of two years and two consecutive one-year terms for having served separate prison terms on two prior convictions. (§ 667.5, subd. (b).)

We remand one of the one-year terms for retrial and amend the abstract of judgment to reflect presentence credits of 169 days. In all other respects we affirm.

FACTS

Diane Ibarra worked as a receptionist at an attorney's office in Oxnard. The building in which Ibarra worked has a public entrance, and an unmarked private entrance which is normally locked.

[1] All statutory references are to the Penal Code.

On the afternoon of September 4, 2000, Chambers walked into the reception area and asked Ibarra for a glass of water. Ibarra left her desk and walked down the hall to get the water. In doing so, she lost sight of Chambers.

Ibarra returned to her desk and gave the water to Chambers. He finished the water and asked for more. Ibarra again left her desk to get him some. When she returned, she found Chambers standing at her desk. She thought he might be taking something. It appeared he might be trying to put something in his pants. Ibarra asked Chambers what he was doing. He did not respond or take the glass of water. He left quickly without turning around to face her.

Ibarra kept her purse under her desk. She checked her purse and found her wallet was missing. She called out to one of the attorneys, Mark Flores. Flores and Ibarra walked out of the office and saw Chambers across the street. They went back into the office where Ibarra called the police.

Flores and another attorney, Manuel Martinez, got into Flores' car to look for Chambers. When they saw him, Martinez got out of the car and confronted Chambers, accusing him of taking Ibarra's wallet. Martinez said he was calling the police and asked Chambers to wait. Chambers, however, walked away. After Martinez asked him several more times to wait, Chambers said he did not take anything and ran off.

Flores and Martinez gave chase by car. When they saw Chambers run into a drug store, they drove to an alley in back of the store and saw him run out. They continued to follow Chambers as he ran, advising the police by cell phone of Chambers' location.

The police arrested Chambers, and Ibarra identified him at the scene. Ibarra returned to her office. A child found a wallet in some shrubbery outside the office building. Ibarra identified the wallet and noted that nothing was missing. The police did not take fingerprints from the wallet.

Chambers elected to rely on the state of the evidence and did not call any witnesses on his behalf.

DISCUSSION

I

Chambers contends the trial court erred in failing to instruct sua sponte with CALJIC No. 2.27.

CALJIC No. 2.27 provides: "You should give the [uncorroborated] testimony of a single witness whatever weight you think it deserves. Testimony by one witness which you believe concerning any fact [whose testimony about that fact does not require corroboration] is sufficient for the proof of that fact. You should carefully review all the evidence upon which the proof of that fact depends."

Chambers cites *People v. Rincon-Pineda* (1975) 14 Cal.3d 864, 885, for the proposition that CALJIC No. 2.27 should be given in every criminal case in which no corroborating evidence is required, regardless of whether corroborating evidence is presented. But Chambers omits to mention that *Rincon-Pineda* only requires the instruction in cases in which there is conflicting testimony. (*Ibid.*) Here there was no conflicting testimony.

In any event, even if it was error not to give the instruction, failure to give the instruction was harmless. Chambers relies on the portion of the instruction that tells the jury to "carefully review all the evidence upon which the proof of [a] fact depends." (CALJIC No. 2.27.) He points to Ibarra's testimony that when Chambers left the office building, he left by the private door without ever walking past her or turning to face her. He posits that one or more jurors may have puzzled how that could happen if they carefully reviewed the evidence. But during closing argument, Chambers' counsel made a point of Ibarra's testimony about the door from which Chambers left her office. The jury was apparently not impressed. There is nothing to suggest an instruction to carefully review the evidence would have led to a different result.

More importantly, the focus of Chambers' defense was the lack of an adequate investigation, including obtaining fingerprints from the wallet, to corroborate Ibarra's testimony. Chambers should have been happy not to have an instruction that the testimony of a single witness is sufficient to prove a fact.

II

Chambers contends the trial court erred when it informed the jury that he had a prior conviction.

The trial court did not expressly inform the jury that Chambers had a prior conviction. Chambers' contention is based on the trial court's statement to the jury that the charging document is called a "felony Information," and that Chambers is charged with petty theft in violation of section 666 and stealing in violation of section 484, subdivision (a).

Chambers suggests a lay juror generally knows the difference between a felony and a misdemeanor. Even assuming that to be true, it is too great a leap to conclude a juror would know or even suspect the felony charge was based on a prior conviction. If a lay juror thought about it at all, he might surmise the felony charge could be based on any number of factors, such as that the theft occurred inside a building.

Nor would the court's reference to Penal Code sections alert a lay juror that Chambers had a prior conviction. The reference to Penal Code section numbers would be meaningless to lay jurors.

The trial court did not inform the jury of Chambers' prior conviction.

III

Chambers contends a one-year sentence for an Iowa prior conviction must be stricken because he did not admit the elements of the special allegation.

The information alleged that in 1993 Chambers was convicted of third degree burglary in Iowa and served a separate term in state prison of one year and more for the offense.

Section 667.5, subdivision (b) requires a consecutive one-year term for each prior separate prison term served for any felony. For the purposes of the section, it is not enough that the defendant admit to a prior felony conviction. (*People v. Lopez* (1985) 163 Cal.App.3d 946, 951.) The defendant must also admit or the People must prove that he served a separate prior prison term. (*Ibid.*)

Here Chambers signed a felony disposition statement in which he admitted the prior Iowa conviction and separate prior sentence "pursuant to P.C. 667.5 (b)." But when the prosecutor asked whether Chambers had a chance to look over the disposition statement, Chambers replied that he did not read it, he just signed it. The prosecutor asked if he wanted time to read it. He said yes. The prosecutor then said, "Why don't I go over it with you on the record?" Chambers admitted on the record that he was convicted in Iowa, but he was not expressly asked whether he served a prison term on the conviction.

The People argue we must presume Chambers read the felony disposition statement. The argument is based on the prosecutor's offer to give Chambers time to read it, and the lack of anything affirmative in the record to show he did not read it. But a fair reading of the record shows that instead of giving Chambers time to read the disposition statement, the prosecutor decided to have Chambers admit the prior orally in open court. Chambers admitted the prior conviction but he never expressly admitted to having served a prison term.

The People also point out that Chambers agreed that the court could look at the probation report. The probation report shows Chambers served a four-year sentence. Chambers argues that the court could only refer to the probation report to confirm the offense actually occurred, not to show he served a prison term. Indeed, Chambers' agreement was that the court could look at the probation report "in order to determine that [the prior] actually did occur[.]" Chambers did not agree that the court could look at the probation report in order to determine that he served a separate prison sentence.

We need not strike the one-year term, however. Instead, we remand for retrial. (*People v. Monge* (1997) 16 Cal.4th 826.)

IV

The People concede that abstract of judgment must be amended to reflect 169 days of presentence custody credits, instead of 161 days.

We reverse the one-year term imposed pursuant to section 667.5, subdivision (b) for the Iowa prior conviction and remand for retrial. We also amend the

abstract of judgment to reflect 169 days of presentence custody. In all other respects we affirm.[2]

NOT TO BE PUBLISHED.

GILBERT, P.J.

We concur:

COFFEE, J.

PERREN, J.

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[2] In addition to briefs filed by his counsel, Chambers has filed supplementary briefs. We need not consider briefs filed by defendants who are represented by counsel. (See *People v. Clark* (1992) 3 Cal.4th 41, 173.)

Roland N. Purnell, Judge

Superior Court County of Ventura

Jerry D. Whatley, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Susan D. Martynec, Supervising Deputy Attorney General, and Ellen Birnbaum Kehr, Deputy Attorney General, for Plaintiff and Respondent.